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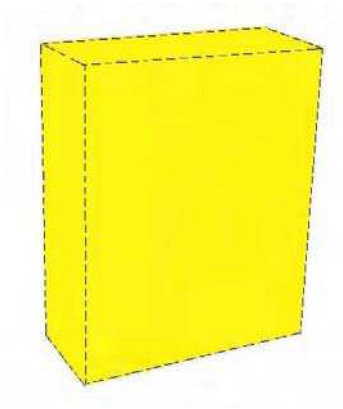
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application of: GENERAL MILLS IP HOLDINGS II, LLC



Mark:

Serial No.: 86/757,390

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Introduction

Applicant appeals from the Examining Attorney's refusal to register the "iconic"¹ Cheerios yellow box mark, which is comprised of the color yellow appearing as the uniform color of product packaging for Applicant's oat-based breakfast cereal (the "Cheerios Yellow Box Mark").

The Cheerios Yellow Box Mark is the signature yellow color of the box of Applicant's Cheerios brand cereal, one of the most famous and popular consumer goods in the United States. Since the cereal's debut in 1941 (first under the name CheerioOats, then in 1945 under the current name Cheerios), the Cheerios Yellow Box Mark has been a fixture on American breakfast tables, and Cheerios has served as the cereal of choice for many consumers throughout their entire lifetimes. From the very first sale, and even before the use of the famous CHEERIOS mark, this cereal has been offered in a box featuring the iconic yellow color of Applicant's mark, and that use has continued to the present day. For over 75 years, consumers have repeatedly encountered the Cheerios Yellow Box Mark in their pantries, on their tables, on store shelves, in print advertisements, in television commercials, in news stories and segments, on websites and social media accounts, and in various other contexts, all of which have fostered the inseparable and widespread mental association between Applicant's mark and a single source.

The extensive evidence made of record by Applicant shows not only that Applicant has invested decades of time and billions of dollars in promoting the Cheerios Yellow Box Mark and educating consumers that Applicant's mark serves a source-identifying function, but also that such efforts have been successful and that Applicant's mark has achieved secondary meaning in the minds of the relevant public. This evidence includes: (i) continuous and extensive use of the Cheerios Yellow Box Mark for 75 years, (ii) billions of dollars in sales, including over \$4 billion U.S. dollars in sales in just the past ten years, (iii) billions of dollars in advertising, including over \$1 billion U.S. dollars in the past ten years, (iv) extensive nationwide "look for" advertising specifically directing consumers' attention to Applicant's Cheerios Yellow Box Mark, (v)

¹ See May 18, 2016 Response to Office Action, TSDR pgs. 151, 164, 166, 184, 190, 193, 195, 196, 199, 201, 209, 211, 214, 216, 232, 272.

numerous unsolicited media references to Applicant's "famous," "iconic," "distinctive," "signature," and "trademark" yellow box, and (vi) survey evidence establishing that 52% of surveyed consumers associate Applicant's mark not just as originating from a single source, but specifically with Applicant and Applicant's Cheerios brand.

This evidence far surpasses what has been required by the Patent and Trademark Office ("PTO") and the courts when assessing secondary meaning. But despite this compelling evidence of acquired distinctiveness, as well as controlling precedent, the Examining Attorney simply dismissed the application, ignoring the arguments and key evidence presented by Applicant, such as Applicant's consumer survey evidence. Rather, instead of assessing the relevant evidence against the well-established secondary meaning factors, the Examining Attorney erroneously concluded that Applicant's use was not substantially exclusive based on overstated and, in many cases, mischaracterized third party uses of cereal boxes uncovered in online searches.

Applicant's Cheerios Yellow Box Mark has unquestionably acquired secondary meaning. The Examining Attorney's refusal was erroneous and a clear deviation from Board and Federal Circuit precedent. Applicant respectfully requests that the Board reverse this refusal and allow the application to proceed to publication.

Procedural History

On September 15, 2015, Applicant filed the present use-based application for the Cheerios Yellow Box Mark. On November 19, 2015, the Examining Attorney issued an Office Action refusing registration of the Cheerios Yellow Box Mark on the grounds that the mark has not achieved secondary meaning for Applicant's goods. On May 18, 2016, Applicant filed a Response to Office Action contesting the Examining Attorney's refusal, and submitting further evidence showing that the Cheerios Yellow Box Mark has achieved secondary meaning for Applicant's goods. On June 2, 2016, the Examining Attorney issued a Final Office Action maintaining her refusal to register the Cheerios Yellow Box Mark on the grounds of lack of secondary meaning. Applicant filed a Notice of Appeal on August 3, 2016.

Argument

A. Threshold for Finding Acquired Distinctiveness

An applicant is required to establish a *prima facie* case of acquired distinctiveness in order to obtain registration. *Yamaha International Corp. v. Hoshino Gakki Co., Ltd.*, 6 USPQ2d 1001, 1004 (Fed. Cir. 1988) (“When registration is sought under Section 2(f), the board publishes the mark for opposition when it is satisfied that the applicant has presented a *prima facie* case of acquired distinctiveness”); *see also In re Capital Formation Counselors, Inc.*, 219 USPQ 916, 919 (TTAB 1983) (“[A]n applicant need not conclusively establish distinctiveness, but rather need only establish a *prima facie* case” in order to warrant publication of the mark for opposition). Any doubt regarding whether an applicant’s mark has achieved acquired distinctiveness must be resolved in the applicant’s favor. *See In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 4 USPQ2d 1141, 1144 (Fed. Cir. 1987) (holding that any doubts with respect to the sufficiency of a showing of acquired distinctiveness should be resolved in favor of the applicant); *see also In re Gourmet Bakers, Inc.*, 173 USPQ 565 (TTAB 1972). As detailed herein, the evidence made of record by Applicant presents, at the very least, a *prima facie* case that the Cheerios Yellow Box Mark has achieved acquired distinctiveness for oat-based breakfast cereal, and the Board must resolve any doubt as to acquired distinctiveness in Applicant’s favor and conclude that the Mark is eligible for registration on the Principal Register.

The Federal Circuit has instructed that it is inappropriate for the Board to place an improperly heavy evidentiary burden on applicants for color marks. *See In re Owens-Corning Fiberglas Corp.*, 227 USPQ 417, 425 (Fed. Cir. 1985) (“We conclude that the Board placed an inappropriately heavy evidentiary burden on [the applicant for a color mark]. As stated in *In re Hollywood Brands, Inc.*, 214 F.2d 139, 141, 102 USPQ 294, 296 (CCPA 1954), there is nothing in the statute ‘which expressly or impliedly imposes an unreasonable burden of proof upon an applicant for registration thereunder, nor is it within our province to read such rigid provisions into it.’”). Applicant’s burden is not to show overwhelming or universal consumer recognition of Applicant’s mark as a source identifier, but rather to show a “syndetic relationship” between Applicant’s mark and a single

source in the minds of “a significant part of the purchasing public.” *In re Owens-Corning Fiberglas Corp.* at 424.

Accordingly, the level of evidence that Applicant need submit to establish a *prima facie* case of acquired distinctiveness of its mark should not be greater than the level of evidence previously accepted by the PTO for third party color marks for other consumer goods. The Board and the Federal Circuit have noted on many occasions that consistency in examination is a goal of the PTO. *See, e.g., In re Rodale Inc.*, 80 USPQ2d 1696, 1700 (TTAB 2006). Although Applicant believes that it has in fact submitted substantially more evidence of acquired distinctiveness than has been historically required, Applicant respectfully submits that there is no reason for the PTO to require Applicant to provide evidence of acquired distinctiveness that is above that previously accepted by the PTO, the Federal Circuit, the Board, and federal courts.

The chart previously made of record by Applicant and attached as **Exhibit A** summarizes the evidence of secondary meaning that was accepted by the PTO as presenting a *prima facie* case of acquired distinctiveness for comparable color marks for consumer goods. This chart shows that Applicant’s evidence of acquired distinctiveness far surpasses that previously accepted by the PTO, the Federal Circuit, and federal courts, as sufficient to show acquired distinctiveness of a color mark. *See* May 18, 2016 Response to Office Action, TSDR pgs. 845-46. Indeed, despite significant research, Applicant has not located, and the Examining Attorney has not cited, a single decision in which the level of evidence of acquired distinctiveness made of record by Applicant in this case was held to be insufficient to support registration on the Principal Register.

B. *Applicant’s Evidence of Acquired Distinctiveness*

When considering acquired distinctiveness, the PTO and the courts consider the following factors and types of evidence: “copying, advertising expenditures, sales success, length and exclusivity of use, unsolicited media coverage, [and] consumer studies (linking the name to a source).” *In re Steelbuilding.com*, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005). The distinctiveness of the Cheerios Yellow Box Mark is clearly established by evidence relating to at least the following factors: (1) exclusivity and length of use in commerce; (2) copying;

(3) amount of sales; (4) amount and manner of advertising, including “look for” advertising; (5) unsolicited media coverage and consumer statements, and (6) consumer survey evidence.

1. Exclusivity and Length of Use

Applicant’s use of the Cheerios Yellow Box Mark with the packaging for its toroidal-shaped, oat-based breakfast cereal has been continuous and extensive for over 75 years. September 15, 2015 Application, TSDR pg. 59 (Declaration of James Murphy at ¶ 6). Applicant’s decades of use are significant, and are much longer or comparable to the periods of use found to support a finding of acquired distinctiveness in the registrations cited in the comparison chart attached as **Exhibit A** and previous decisions of the Board and the Federal Circuit – including the very decisions cited by the Examining Attorney in the Final Office Action. *See, e.g., In re Owens-Corning Fiberglas Corp* at 422-23 (29 years of continuous use supported finding of acquired distinctiveness of color mark); *In re American Home Products Corp.*, 226 USPQ 327, 330 (TTAB 1985) (25 years of continuous use supported finding of acquired distinctiveness of color mark); *In re Uncle Sam Chem. Co.*, 229 USPQ 233, 235 (TTAB 1986) (finding §2(f) claim of acquired distinctiveness where applicant had submitted declaration of its president attesting to over 18 years of substantially exclusive and continuous use); *In re Carl Walther GmbH*, Serial No. 77/096,523 (TTAB October 26, 2010) (non-precedential) (75 years of use supported finding of acquired distinctiveness of product configuration). This factor weighs in favor of a finding of acquired distinctiveness.

2. Amount of Sales

Applicant has enjoyed immense commercial success of the goods sold under the Cheerios Yellow Box Mark, with sales over just the last decade in excess of \$4 billion U.S. dollars. September 15, 2015 Application, TSDR pg. 61 (Decl. at ¶ 18). Applicant’s massive sales figures objectively demonstrate that a significant portion of the relevant consumers have repeatedly purchased Applicant’s cereal and become very familiar with the Cheerios Yellow Box Mark as a result of these repeated purchasing decisions. These sales figures well exceed those relied upon by the Board in previous decisions, and strongly support a finding of acquired distinctiveness. *See In re Black & Decker Corp.*, 81 USPQ2d 1841, 1844 (TTAB 2006) (total sales exceeding

\$500 million between 2000 and 2004 found to be “substantial” and supporting finding that applicant’s key head design has acquired distinctiveness); *In re Thomas Nelson, Inc.*, 97 USPQ2d 1712, 1717-18 (TTAB 2011) (finding total sales of nearly \$500 million since 1986 to be “substantial” and support finding of acquired distinctiveness); *Companhia de Bebidas das Américas - AMBEV v. The Coca Cola Co.*, Opposition Nos. 91178953, et al. (TTAB May 2, 2012) (non-precedential) (finding applicant’s sales of over \$4 billion of its ZERO line of beverages to be “significant numbers by any measure” and reasoning that opposer’s “attempt to show that the ZERO marks have not acquired distinctiveness simply fails in light of the scope of [applicant]’s significant sales and marketing numbers.”); *In re Hershey Chocolate and Confectionary Corp.*, Serial No. 77/809,223 (TTAB June 28, 2012) (non-precedential) (sales of over \$4 billion between 1998 and 2010 are “compelling numbers” supporting finding of acquired distinctiveness of product configuration).

3. Amount and Extent of Advertising

Applicant has invested heavily in promoting its Cheerios Yellow Box Mark, spending well over \$1 billion U.S. dollars over just the past decade in marketing and promotional activities for the goods offered in connection with the Mark. September 15, 2015 Application, TSDR pg. 59 (Decl. at ¶ 9). These advertising expenditures are magnitudes higher than amounts previously found to support a finding of acquired distinctiveness of a color mark or product configuration. *In re Owens-Corning Fiberglas Corp.* at 422-23 (advertising expenditures of over \$54 million between 1972 and 1982); *In re American Home Products Corp.* at 330 (\$8 million in advertising and promoting product between 1960 and 1980); *In re Black & Decker Corp.* at 1844 (\$20 million in advertising between 2000 and 2004 found to be “substantial” and supporting finding that applicant’s key head design has acquired distinctiveness); *In re Thomas Nelson, Inc.* at 1717-18 (finding over \$4 million in advertising expenditures since 1986 to be “substantial” and support claim of acquired distinctiveness); *In re Hershey Chocolate and Confectionary Corp.* (over \$186 million in advertising as of 1986 a “compelling number[.]” supporting finding of acquired distinctiveness).

Over the years, Applicant has advertised and promoted its goods offered under its Cheerios Yellow Box Mark through a wide variety of different means in order to reach as many different consumers as possible.

For example, Applicant has advertised its mark via (a) national television, including a well-received commercial that aired during Super Bowl XLVIII, (b) radio advertising, (c) the website at cheerios.com and other third party websites, (d) numerous social media platforms, including Facebook, Twitter, Google+, Pinterest, Tumblr, and Instagram, (e) blogs, (f) direct mail and door hangers, (g) mobile marketing, (h) newspaper inserts, (i) print advertising, (j) partnerships with baby products companies, (k) NASCAR sponsorship, (l) the Family Breakfast Project, (m) the Cheer on Reading literacy program, (n) coupons, (o) sampling and customer events, (p) doctors' offices, (q) national conferences sponsored by the Bell Institute of Health and Nutrition, (r) various merchandise including writing instruments, notebooks, food containers, and clothing, (s) materials relating to the "Women, Infants, and Children" federal supplemental nutrition program, (t) the Box Tops for Education school fundraising loyalty program, and (u) the Outnumber Hunger charitable food donation program. September 15, 2015 Application, TSDR pg. 59-60 (Decl. at ¶ 11 and 13). These advertising and marketing initiatives annually produce over 50 million consumer impressions for the goods offered under Applicant's Cheerios Yellow Box Mark. *Id.* at ¶ 12.

As shown by the sample advertisements in the record, Applicant's advertising materials feature two consistent themes that reinforce consumers' associations of the Cheerios Yellow Box Mark with a single source: (1) prominent and repeated depictions of Applicant's signature bright yellow cereal box, and (2) other complementary uses of the signature yellow color of the Cheerios Yellow Box Mark in various contexts, such as the yellow color of text, the yellow color of the advertisement background, the yellow color of the clothing of the "hero" of the commercial, and the yellow color of the Cheerios cartoon mascot. *See, e.g.*, May 18, 2016 Response to Office Action, TSDR pgs. 132-145; May 18, 2016 Evidence, TSDR Doc. Nos. 10-20; September 21, 2015 Specimen, TSDR pgs. 1-54. This ubiquitous use of pictures of Applicant's yellow cereal box and the color yellow has established a strong association in the minds of consumers between Applicant's goods and the color yellow and, as demonstrated by the consumer survey evidence, caused consumers to associate the Cheerios Yellow Box Mark with Applicant and understand the Cheerios Yellow Box Mark as serving a source-identifying function.

Notably, the record shows that Applicant has engaged in extensive nationwide “look for” advertising and consistently specifically drawn consumers’ attention to the yellow coloring of its Cheerios box as a source-identifier in Applicant’s advertising campaigns. For example, several of the Cheerios television commercials made of record feature jingles that begin with the lyrics “It’s the **big yellow box** that everyone knows” or “It’s the **big yellow box** that every mom knows,” and end with the tagline “The one and only Cheerios.” May 18, 2016 Evidence, TSDR Doc. Nos. 7-9. Another commercial depicting Applicant’s mark features a father remarking to his adult daughter “You know for a second there, I thought it was twenty years ago. You up with the sun, and that **yellow box**.” May 18, 2016 Evidence, TSDR Doc. No. 6. Applicant’s prominent use of this type of “look for” advertising with respect to its Cheerios Yellow Box Mark strongly supports a finding of acquired distinctiveness. *In re Owens-Corning Fiberglas Corp* at 423-424; *see also In re Hodgdon Powder Co.*, 119 USPQ2d 1254, 1258-59 (TTAB 2016) (finding applicant’s evidence of effective “look for” advertising sufficient to support finding of acquired distinctiveness of color mark despite lack of admissible survey evidence or other direct evidence showing recognition of the color as a source-identifier).

Applicant’s “look for” advertising is also notable here in showing that the refusal was erroneous, in that the Examining Attorney initially argued, apparently without having fully reviewed Applicant’s sample advertisements, that (i) Applicant had not engaged in “look for” advertising, and that (ii) this weighed against a finding of secondary meaning. Both prongs of this argument are wrong. The first prong is an incorrect statement of fact: Indeed, Applicant had submitted evidence showing that it engaged in “look for” advertising, and when Applicant pointed this out to the Examining Attorney in its Response to Office Action, the Examining Attorney did not address – or even comment upon – the “look for” advertising evidence of record in the Final Office Action. Moreover, the second prong of the Examining Attorney’s argument is an incorrect statement of the law: Explicit advertising whereby the advertisements specifically tell consumers to “look for” the mark at issue is not critical or required for a finding of acquired distinctiveness; rather, the prominent featuring and depiction of the mark in advertising without explicit “look for” wording is sufficient. *See e.g., In re Hershey Chocolate and Confectionary Corp.* (“Similarly, while there is no evidence that applicant has promoted the

candy bar configuration via ‘look for’ advertisements, we note that at least some of the advertisements submitted [by the applicant] display the candy bar configuration prominently.”); *see also In re American Home Products Corp.* at 330 (finding that the applicant’s distribution of mailings and advertisements that “prominently feature the ‘EQUIGESIC’ tablet in color” supports a finding of acquired distinctiveness; mailings did not include explicit “look for” wording); *T-Mobile US, Inc. v. Aio Wireless LLC*, 991 F. Supp. 2d 888, 905 (S.D. Tex. 2014) (finding that plaintiff’s practice of “prominently display[ing] the magenta mark in virtually every aspect of its public marketing and communications” and distribution of advertisements that “prominently feature the magenta color, with particular emphasis on large swaths of magenta that cause the advertisements to ‘brim’ with the color” “strongly weigh[s]” in favor of secondary meaning).

Accordingly, Applicant’s advertising efforts and expenditures strongly weigh in favor of a finding of secondary meaning.

4. Unsolicited Media Coverage and Consumer Statements

Unsolicited media coverage is particularly relevant evidence of secondary meaning, since this type of evidence does not originate from the applicant and shows that the applicant’s efforts towards fostering acquired distinctiveness have had an effect in the marketplace. *T-Mobile US, Inc.* at 906 (finding secondary meaning in color mark where plaintiff provided evidence that “[m]edia coverage, including newspapers and other publications have recognized the magenta anchor to T-Mobile’s marketing and physical appearance.”); *Companhia de Bebidas das Américas - AMBEV v. The Coca Cola Co.* (evidence showing “that the ZERO line of beverages and [applicant]’s numerous marketing campaigns have been widely discussed in the media” supports a finding of acquired distinctiveness).

Over the past 75 years, Applicant’s Cheerios Yellow Box Mark has received extensive and widespread unsolicited coverage from numerous different media outlets, as well as in recent years extensive coverage from ordinary consumers that maintain personal or parenting blogs. Many of these media stories and consumer statements provide clear evidence that Applicant’s long use of the Cheerios Yellow Box Mark, its immense sales, and its extensive promotional efforts have had the desired effect of creating an inextricable association

between Applicant's mark and Applicant in the minds of consumers, and a widespread understanding among consumers that the Cheerios Yellow Box Mark serves a source-identifying function.

Many of the unsolicited third party media articles made of record reference Applicant's "famous," "distinctive," "iconic," "signature," or "trademark" yellow box. *See, e.g.*, May 18, 2016 Response to Office Action, TSDR pgs. 158, 160, 164, 166, 168, 170, 182, 193, 196, 206, 211, 216, and 232. The following is a sample of the over 35 similar third party articles made of record by Applicant:

- USA Today (Associated Press) (2011): "*The answer, of course, is Cheerios. **The iconic cereal, known by its distinctive yellow box...***" *Id.* at TSDR pg. 158.
- The Huffington Post (2014): "...when compared to the single gram that sits in each serving of the original Cheerios that come in **that iconic yellow box.**" *Id.* at TSDR pg. 164.
- New York Magazine (2013): "*The De Blasios welcomed the comparison; a post on Bill's campaign website entitled 'Cheerios' features the family posed around the cereal's **signature yellow box.***" *Id.* at TSDR pg. 168.
- The Midland Reporter-Telegram (2016): "***Cheerios are easy to find on store shelves: Just look for the big yellow box.***" *Id.* at TSDR pg. 174.
- The New York Daily News (2013): "*The ad ends with the word 'Love' emblazoned over **the cereal's trademark yellow box...***" *Id.* at TSDR pg. 182.
- Stealing Share (undated): "*Basically, Trix didn't have the cover of the overall Cheerios brand....**Its yellow box is instantly recognizable.***" *Id.* at TSDR pg. 223.
- Frugal Allergy Mom blog (2014): "*One of the first foods we introduced to the little man is Cheerios. He recognizes **the trademark yellow box** anywhere...*" *Id.* at TSDR pg. 241.

This evidence shows universal media and consumer recognition of the source-identifying function of the Cheerios Yellow Box Mark from dramatically diverse sources, and strongly supports the conclusion that the Cheerios Yellow Box Mark has achieved secondary meaning in the minds of a significant portion of the relevant consumers.

5. Consumer Survey Evidence

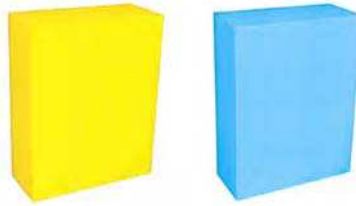
Consumer survey evidence is often characterized by the courts as the “most persuasive evidence of secondary meaning,” as surveys provide a direct and real world snapshot of consumer impressions. *Vision Sports, Inc. v. Melville Corp.*, 12 USPQ2d 1740, 1744 (9th Cir. 1989); *see also Berner Int’l Corp. v. Mars Sales, Co.*, 26 USPQ2d 1044, 1050 (3d Cir. 1993) (noting that “direct consumer evidence, e.g., consumer surveys and testimony is preferable to indirect forms of evidence.”); *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 114 USPQ2d 1827, 1833 (Fed. Cir. 2015) (quoting *Berner Int’l Corp.*). Applicant submits that its survey evidence showing substantial consumer association between the Cheerios Yellow Box Mark and Applicant is compelling and conclusive evidence that Applicant’s long use of this mark, immense sales, and extensive and widespread advertising have in fact created a syndetic relationship between the Cheerios Yellow Box Mark and a single source in the minds of a significant part of the purchasing public.

The survey was performed by Dr. Isabella Cunningham, the Chair of the Department of Advertising at The University of Texas at Austin, an accomplished academic and highly reputable expert that has been retained as an expert witness in numerous trademark proceedings. The survey subjects were individuals residing in the United States who were older than 18 years of age, had purchased dry cereals in the previous month, and who planned to purchase dry cereals in the following month. The panel was screened to eliminate any respondents or members of his or her household who worked for a company manufacturing dry cereals, and to ensure that the respondents were able to clearly see stimuli images and distinguish colors.

The survey consisted of two questionnaires: a “test” questionnaire and a “control” questionnaire. 419 completed responses to the test questionnaire and 206 completed responses to the control questionnaire were obtained and analyzed. The gender and age distribution of the test and control subjects were representative of the US population as well as of US buyers of dry cereal.

The control and test questionnaires were identical except for the stimulus used: the test questionnaire stimulus was the image of an unadorned cereal box featuring the same yellow coloring as the Cheerios Yellow

Box Mark (shown below on left), and the control questionnaire stimulus was an unadorned cereal box featuring light blue coloring (shown below on right):



Neither stimulus featured any terms or markings other than a single color. The subjects, who answered the questions interactively and were not permitted to review their answers or return to previous questions, were asked if they knew the brand of cereal that comes in each box. The responses were completely unaided—the question was asked as an open-ended question, and the subjects were not given a closed universe of possible brands to choose from, nor was any particular brand suggested or prompted. Moreover, the subjects were not merely asked whether they associated the yellow test box with a single source, but rather were asked to name the *specific* source that they associate with the yellow color box. The subjects were then asked follow-up questions regarding the reasons they thought the stated brand was associated with the box, and specifically the characteristics of the box that caused them to associate the box with the stated brand.

52.7% of the test subjects identified Cheerios as the cereal brand that comes in the yellow test box. May 18, 2016 Response to Office Action, TSDR pg. 277. Within this population, 55.6% of female consumers, 67.6% of subjects between 31 and 45 years of age, and 55.5% of consumers who do all of the grocery shopping for their household identified Cheerios as the cereal brand that comes in the yellow test box. *Id.* Nearly all of the test subjects that associated Cheerios with the yellow box stated that they did so because of the yellow color of the box. *Id.* at TSDR pg. 278. Based on the results of the survey, Dr. Cunningham concluded that in her expert opinion the Cheerios Yellow Box Mark has acquired secondary meaning among the relevant US consumers. *Id.*

The 52% consumer association rate between the Cheerios Yellow Box Mark and Applicant for the test subjects is particularly significant considering that the survey's methodology featured a number of conservative

elements. For example, it is well-settled that a finding of acquired distinctiveness does not require that the buyer “knows the identify of that ‘single source’ in the sense that he know the corporate name of the producer or seller....All that is necessary to establish a secondary meaning is that the ordinary buyer associates the mark with a single, albeit anonymous, source.” 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 15:8 (4th ed.); *see also* *Tone Bros., Inc. v. Sysco Corp.*, 31 USPQ2d 1321, 1329 (Fed. Cir. 1994); *Nextel Communications Inc. v. Motorola Inc.*, 91 USPQ2d 1393, 1403 (TTAB 2009) (“The anonymous source rule essentially states that a consumer need not know the identity of the manufacturer of goods or the provider of services, and that all that is necessary to establish secondary meaning is that the consumer associates the proposed mark with a single source.”). However, Dr. Cunningham’s survey did not simply assess whether the subjects associated the Cheerios Yellow Box Mark with a single source only, but rather whether the subjects could identify the specific single source associated with the mark. In other words, the subjects did not just associate the Cheerios Yellow Box Mark with a “single source,” but rather associated that mark *specifically with Applicant by name*. The subjects presented with the test stimuli were required to come up with the name “Cheerios” or “General Mills” on their own, which is of course more difficult than simply stating whether they thought the yellow box was used by one source, albeit anonymous, or more than one source. Thus, Dr. Cunningham’s survey showing that 52% of the test subjects were able to associate a yellow cereal box specifically with Applicant is very strong evidence that Applicant’s mark has achieved secondary meaning, if not fame, in the United States.

The Federal Circuit has specifically concluded that survey evidence showing a rate of consumer recognition of a color mark with a single anonymous source that is comparable to the rate of consumer recognition in Dr. Cunningham’s survey of the Cheerios Yellow Box Mark specifically with Applicant weighs in favor of a finding of secondary meaning, and it is inappropriate for the PTO to impose a heavier evidentiary burden on applicants. *In re Owens-Corning Fiberglas Corp.* at 424-25 (Fed. Cir. 1985) (“Consumer recognition in 1981 as to the source of ‘pink’ insulation was 50%, a percentage considerably greater than that held sufficient in many cases. *See, e.g., Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 217

USPQ 988 (5th Cir.1983), where 23-28% correct responses were held sufficient to establish secondary meaning. We conclude that the Board placed an inappropriately heavy evidentiary burden on [the applicant].”); *see also* TMEP § 1212.06(d) (survey results showing over 50% consumer recognition of a mark with a single source “are sufficient to establish secondary meaning”); *In re Jockey Int., Inc.*, 192 USPQ 579, 581 (TTAB 1976) (survey showing 51.6% recognition with a single source found sufficient to establish acquired distinctiveness for trade dress); *T-Mobile US, Inc.* at 906 (survey showing 49% of subjects associate magenta color specifically with the plaintiff supports finding of secondary meaning); *In re Carl Walther GmbH* (“Approximately 54% of the participants who completed the survey stated that they were able to identify who makes applicant’s PPK pistol based on the shape of the pistol; and 33% of survey participants correctly identified applicant, or its licensee, as the maker...These percentages are not out of line with previous cases where secondary meaning or acquired distinctiveness in a mark has been established.”); *In re Hershey Chocolate and Confectionary Corp.* (“After adjusting for the control group, approximately 42% of the survey participants correctly identified applicant as the maker of the candy bar....These percentages are significant when compared to previous cases where secondary meaning or acquired distinctiveness in a mark has been established.”).

Additionally, the 52% response rate of Dr. Cunningham’s test subjects is well above or comparable to the response rate of consumers associating a mark with a specific source that has been accepted to show secondary meaning in other decisions. *See, e.g., T-Mobile US, Inc.* at 906 (49%); *McNeil-PPC Inc. v. Granutec Inc.*, 37 USPQ2d 1713, 1716 (E.D.N.C. 1995) (41%); *Monsieur Henri Wines, Ltd. et al. v. Duran*, 204 USPQ 601, 605 (TTAB 1979) (37%); *Winchester Fed. Save. Bank v. Winchester Bank, Inc.*, 359 F. Supp. 2d 561, 566 (E.D. Ky. 2004) (35%); *In re Carl Walther GmbH* (33%); *In re Hershey Chocolate and Confectionary Corp.* (42%); *Royal Crown Co., Inc. and Dr. Pepper/Seven Up, Inc. v. The Coca-Cola Co.*, Oppositions Nos. 91178927, et al. (TTAB May 23, 2016) (non-precedential) (52%).

Accordingly, Applicant’s survey evidence conclusively weighs in favor of a finding of acquired distinctiveness.

6. Summary of Applicant's Evidence of Acquired Distinctiveness

In sum, Applicant's evidence of record indisputably presents not merely a *prima facie* case, but rather conclusively establishes that the Cheerios Yellow Box Mark has acquired distinctiveness under relevant precedent: Applicant's use of the mark has been continuous and substantially exclusive for over 75 years, Applicant has enjoyed billions of dollars in sales revenue of the goods sold under the mark, and Applicant has invested billions of dollars in promoting the mark and the goods sold thereunder through an extensive variety of means, including "look for" advertising, and with notable success. As a result of those efforts, recognition of the Cheerios Yellow Box Mark as a source-identifier of Applicant has become ingrained in the minds of a significant segment of the relevant consumers, as proved by the direct evidence of unsolicited media and consumer statements made of record and the impressive results of Dr. Cunningham's consumer survey.

C. The Examining Attorney's Arguments and Evidence

In stark contrast to the extensive record of evidence of acquired distinctiveness submitted by Applicant, the arguments and limited evidence made of record by the Examining Attorney are speculative, unreliable, with limited (if any) probative value, and inapposite with the precedent of the Board.

1. Applicant's Evidence Was Not Properly Considered.

The record of the examination of this application shows not only that Applicant's evidence was not properly considered, but that Examining Attorney had made up her mind before she had even considered the Applicant's evidence.

"[A]ny DVD or survey you send would not overcome the refusal." With its application, Applicant submitted a DVD containing a variety of important evidence supporting Applicant's claim of acquired distinctiveness, including Dr. Cunningham's survey report and numerous print and television advertisements that promote Applicant's mark, including Applicant's "look for" advertising. Although this DVD was received by the PTO, the Examining Attorney was apparently unable to locate the DVD and review the submitted evidence. September 15, 2015 Paper Correspondence Incoming, TSDR pgs. 1-3; November 9, 2015 Notation to File, TSDR pg. 1. Applicant's in-house counsel emailed the Examining Attorney noting that the DVD

evidence had not been made part of the record and asking if the Examining Attorney received the DVD. The Examining Attorney replied on March 30, 2016 advising that the PTO had received the DVD but that it could either no longer be found or that it could not be reviewed as a result of format conversion issues. Rather than asking Applicant to re-submit the evidence, including the consumer survey evidence, in a different format so that it could be properly reviewed and made part of the record, the Examining Attorney simply advised Applicant's counsel that "any DVD or survey you send would not overcome the refusal or the denial of the Section 2(f) claim because (a) the mark is not inherently distinctively and (b) applicant does not have 'substantially exclusive' use of the color on the box. The evidence of record confirms that many third parties offer cereal in yellow boxes." See March 30, 2016 email from Tasneem Hussain attached hereto as **Exhibit B**.

The Examining Attorney's assertion that there was no evidence that Applicant could conceivably submit to overcome the refusal, and that therefore the Examining Attorney's review of the evidence on the DVD was unnecessary, is inadequate and improper examination practice. In particular, the assertion that an Examining Attorney need not review a consumer survey expert report showing consumer recognition of Applicant's mark consistent with a level unanimously found to support secondary meaning before that Examining Attorney assesses Applicant's claim of secondary meaning flies in the face of relevant precedent.

2. The Examining Attorney's Rejection Appears to be Solely Based on Internet Research

In the initial November 19, 2015 Office Action, the Examining Attorney – while noting that Applicant's submitted DVD could not be found or viewed – supported her conclusion that Applicant's mark has not achieved secondary meaning by (1) asserting that Applicant has not engaged in any "look for" advertising and stating "[t]here is no evidence that applicant has made an effort to educate consumers that the color yellow is a source identifier," (2) arguing that Applicant's references to its survey were unpersuasive since "only half of the survey respondents (52%) linked applicant's name to the yellow cereal box" and therefore Applicant did "not show an overwhelming recognition of the color as applicant's source identifier" and moreover that Applicant had only provided a "summary of the results of its survey without any other documentation...to determine the validity and significance of the results," (3) dismissing Applicant's

monumental sales and advertising figures as not being “dispositive” standing alone to support secondary meaning, and (4) submitting website screenshots that she alleged shows third party use of the Cheerios Yellow Box Mark with Applicant’s goods and concluding that Applicant’s use has not been substantially exclusive.

In its Response to Office Action, Applicant (1) again submitted evidence that it has in fact engaged in “look for” advertising and promoted the Cheerios Yellow Box Mark as a source-identifier, (2) fully explained the details and conditions of its survey, provided the complete expert report (again), and cited unanimous precedent showing that, contrary to the Examining Attorney’s unsupported claims, Applicant’s survey response rate supports a claim of secondary meaning, (3) reiterated that its sales and advertising figures are not Applicant’s sole basis for secondary meaning but strongly weigh in favor of secondary meaning in view of the other evidence of record, and (4) explained the numerous reasons why the Examining Attorney’s submitted evidence was insufficient to prove that Applicant’s use of the Cheerios Yellow Box Mark has not been substantially exclusive.

Notably, in the Final Office Action, the Examining Attorney does not dispute or even discuss Applicant’s actual evidence of the distinctiveness of its mark, the probative value of Applicant’s survey evidence, its evidence of “look for” advertising, its extensive evidence of unsolicited media coverage, or the probative value of Applicant’s evidence of sales and advertising expenditures. Rather, the Examining Attorney’s refusal in the Final Office Action relies solely on her conclusory statement that Applicant’s use of the Cheerios Yellow Box Mark has not been substantially exclusive based on her limited internet research.

3. The Examining Attorney’s Internet Research Has Little to No Probative Value

Applicant submits that the website evidence made of record by the Examining Attorney is woefully inadequate to rebut Applicant’s actual evidence of acquired distinctiveness, let alone raise a question as to whether Applicant’s use is not substantially exclusive.

First, many of the alleged third party uses made of record by the Examining Attorney are irrelevant, as they do not show third party use of the Cheerios Yellow Box Mark, or even a similar color scheme, with Applicant’s goods. For example, the chart on the next page shows a comparison of the Cheerios Yellow Box

Mark next to some of the evidence that the Examining Attorney characterizes in the Final Office Action as coexisting third party uses of “the same yellow box” as the Cheerios Yellow Box Mark:

Applicant’s mark	Examining Attorney’s Alleged Third Party Uses
	

This evidence shows third party uses of completely different marks and color schemes and, the Examining Attorney’s mischaracterization notwithstanding, is irrelevant.

Second, much of the evidence submitted by the Examining Attorney is unreliable and without any probative value due to the fact that there is no proof that the alleged product is actually being sold within the United States. For example, the Google image search submitted by the Examining Attorney includes several purported cereal boxes that are clearly fake (such as a “Weedies” box and a “Honey-Chrome” box), or have almost certainly not been sold for years if not decades (such as the “Mr. T” cereal box). In addition, several of the website screenshots submitted by the Examining Attorney with the Final Office Action consist only of a picture of a box with no other content on the page, and accordingly there is no way for Applicant or the Board to determine whether the alleged product exists or is actually currently being sold within the United States. This evidence cannot be afforded any probative value and it certainly is not sufficient to rebut actual evidence of distinctiveness, such as survey evidence measuring actual consumer impressions in the marketplace.

Third, and most importantly, the relevant threshold under the Lanham Act is not “exclusive use,” but “substantially” exclusive use. Third party uses that are infringing or insubstantial do not invalidate a claim of acquired distinctiveness, even if there are numerous such uses. *See, e.g., L.D. Kichler Co. v. Davoil, Inc.*, 52 USPQ2d 1307, 1309 (Fed. Cir. 1999); *Companhia de Bebidas das Américas - AMBEV v. The Coca Cola Co.* (finding that evidence of third party trademark uses of “ZERO” with beverages and “numerous” third party descriptive uses of zero-formative phrases do “not undercut [applicant’s] claim of acquired distinctiveness,” since applicant’s massive sales and advertising figures indicate that its use has been “substantially” exclusive).

Moreover, the “substantially exclusive” inquiry under the Lanham Act pertains simply to whether five years of continuous use alone may be accepted by the PTO as *prima facie* evidence of acquired distinctiveness; in other words, it’s a statutorily-recognized “proxy” for when a presumption can be made in place of actual evidence of acquired distinctiveness. As the first sentence of Section 2(f) makes clear, the ultimate issue is acquired distinctiveness, not “substantially exclusive” use: “Except as expressly excluded in subsections (a), (b), (c), (d), (e)(3), and (e)(5) of this section, ***nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce.***” 15 U.S.C. 1052(f)²; *compare also* 37 C.F.R. 2.41(a)(2) with 37 C.F.R. 2.41(a)(3). Here, the record is replete with overwhelming direct actual evidence that the Cheerios Yellow Box Mark has become distinctive in the minds of the public to identify Applicant’s products, including not only unchallenged consumer survey evidence, but also the multitude of unsolicited media and consumer references to Applicant’s “famous,” “distinctive,” “iconic” and “trademark” yellow box. These references would be completely nonsensical but for the fact that the Cheerios Yellow Box Mark has acquired distinctiveness.

Even if one were to take the Examining Attorney’s characterizations of her evidence at face value, the fact that “knock-off” oat-based breakfast cereals might use a yellow box reminiscent of the signature color of the Cheerios Yellow Box Mark simply underscores that Applicant’s mark has accrued significant goodwill and consumer recognition, and that these “knock-offs” are attempting to trade off of that hard-earned goodwill. The Board and the Federal Circuit have recognized that copying by competitors is compelling evidence of secondary meaning. *See, e.g., In re Steelbuilding.com*, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005) (“In determining whether secondary meaning has been acquired, the Board may examine copying.”); *In re Hershey Chocolate and Confectionary Corp.* (finding that it is likely that brownie pan maker copied configuration of applicant’s chocolate bar “because of [the configuration’s] powerful association with applicant’s chocolate bars

² “Substantially exclusive” is only mentioned in the second sentence of Section 2(f): “The Director may accept as *prima facie* evidence that the mark has become distinctive, as used on or in connection with the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made.”

in the mind of the consumer,” and accordingly the copying supports a finding of acquired distinctiveness of the configuration).

If, as asserted by the Examining Attorney, Applicant’s mark serves only an ornamental purpose, it is simply not reasonable to conclude that cereal competitors spontaneously decided to also use the same ornamental color that is reminiscent of Applicant’s mark. Rather, the more reasonable conclusion would be that the participants in the market have recognized that Applicant’s mark serves a valuable source-identifying function, and are attempting to benefit by copying Applicant’s mark. *See Knorr-Nahrungsmittel A.G. v. Reese Finer Foods Inc.*, 9 USPQ2d 1309, 1313 (D.N.J. 1988) (finding that it “would be naive to suggest that [defendant] happened upon a design that imitates in significant ways [the plaintiff’s trade dress]...This fact of copying alone is sufficient to establish secondary meaning in a trade dress case.”); *In re Carl Walther GmbH* (“It simply stands to reason that a party would only attempt to replicate another party’s trade dress or product configuration, under license or not, if that trade dress or product configuration is perceived by the consumers as distinctive.”).

Accordingly, if this internet evidence made of record by the Examining Attorney has any probative value, it is simply to show a pattern of copying of the Cheerios Yellow Box Mark, which further supports the actual evidence of record of acquired distinctiveness. *See, e.g., Clicks Billiards Inc. v. Sixshooters Inc.*, 58 USPQ2d 1881, 1888-89 (9th Cir. 2001) (evidence of deliberate copying of trade dress may suffice to support an inference of secondary meaning); *M. Kramer Manufacturing Co., Inc. v. Andrews, et al.*, 228 USPQ 705, 724 (4th Cir. 1986) (“We hold that evidence of intentional, direct copying [of trade dress] establishes a prima facie case of secondary meaning.”); *McNeil-PPC Inc.* at 1716 (“In the instant matter, it is obvious that Granutec’s marketing of red and yellow gelatin caplets is an effort to copy, as closely as possible, the outward appearance of the Tylenol gel cap. This fact alone establishes a presumption in favor of secondary meaning.”).

In any event, the Examining Attorney has not provided **any** credible evidence that the alleged third party internet uses are consequential or substantial or have had any impact on how consumers understand Applicant’s mark in the context of Applicant’s goods. In response to Applicant’s arguments regarding the lack of reliable evidence that these uses are consequential or not copies, the Examining Attorney merely asserted

(without citing any relevant authority) in the Final Office Action that “[w]hether others are infringing on applicant’s goodwill is not the issue here.... The examining attorney does not need to provide sales figures, channels of trade, and advertising of third parties offering yellow boxed cereal; it is enough that there is evidence of third party usage in the marketplace today to negate applicant’s claim of substantially exclusive use of the color on its packaging.” This unsupported statement is plainly a misstatement of law and precedent, and it is an extraordinarily thin premise to conclude that there is absolutely no doubt that Applicant’s mark has not achieved secondary meaning despite the extensive actual evidence submitted by Applicant of consumer recognition. The Examining Attorney’s conclusion is particularly flawed when one considers that direct actual marketplace evidence that is contrary to the Examining Attorney’s position was simply ignored – evidence that established that, despite the purported co-existence, relevant consumers strongly associate the Cheerios Yellow Box Mark specifically with Applicant.

Further, as the Federal Circuit and Board have instructed on numerous occasions, the mere fact that products can be found online cannot permit the assumption that consumers have encountered these products or that these products have any effect whatsoever on a consumer’s purchasing decisions. *See, e.g., Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005) (“Where the record includes no evidence about the *extent of [third-party] uses*... [t]he probative value of this evidence is thus minimal.”) (quoting *Han Beauty, Inc. v. Alberto-Culver Co.*, 57 USPQ2d 1557 (Fed. Cir. 2001)) (emphasis in original). Given the overwhelming actual evidence of record showing that Applicant’s mark has acquired distinctiveness, something more than mere website print-outs without any supporting evidence is needed to rebut Applicant’s evidence showing real world marketplace impressions. *See T-Mobile US, Inc. v. Aio Wireless LLC* at 913 (citing *Palm Bay Imps.* and finding defendant’s evidence of third party uses of magenta color does not rebut plaintiff’s claim of acquired distinctiveness in color since “[i]dentifying other uses of magenta in marketing is not prima facie evidence that those uses have affected how the public views magenta in the wireless-telecommunications industry. The court has not been provided with information

about the extent and effect of the purported third-party use. [Defendant's] argument does not undermine this court's findings of fact and conclusions of law on secondary meaning.").

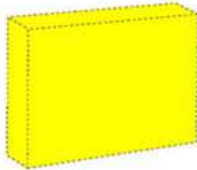


In sum, the thin evidentiary record compiled by the Examining Attorney falls woefully short of rebutting the substantial direct and indirect evidence of acquired distinctiveness submitted by Applicant, particularly considering that Applicant's burden for registration is to present a *prima facie* case of secondary meaning and that any doubt regarding whether the Cheerios Yellow Box Mark has obtained secondary meaning at this stage must be resolved in the Applicant's favor.

Conclusion

Applicant has demonstrated that the Cheerios Yellow Box Mark has achieved secondary meaning in the minds of the public by presenting highly probative direct evidence including survey evidence, evidence of unsolicited media and consumer recognition of Applicant's "famous," "distinctive," "iconic" and "trademark" yellow box as a source-identifier, evidence of extensive advertising by Applicant, including "look for" advertisements directing consumers to understand the Cheerios Yellow Box Mark as a source-identifier, and fully supported evidence that Applicant has used its Cheerios Yellow Box Mark for several decades. Applicant has enjoyed incredible commercial success of the goods sold under its mark over many years, and Applicant has invested heavily in promoting its mark through a wide variety of means. Conversely, the Examining Attorney has not rebutted any of this direct evidence, but rather has simply submitted website printouts of what she contends are other cereal boxes that she found on the internet, many of which are completely irrelevant and all of which are unsupported by any reliable evidence to show that they are consequential, not attempting to trade-off of Applicant's established goodwill, or have had any impact whatsoever on the commercial impression consumers associate with the Cheerios Yellow Box Mark.

Applicant respectfully submits that the Examining Attorney's conclusion that the Cheerios Yellow Box Mark has doubtlessly failed to achieve secondary meaning is simply unsustainable in view of the evidence of record, and is a clear deviation from the precedent of the Board and the Federal Circuit. Accordingly, Applicant requests that the Board reverse the refusal and allow the application to proceed to publication.

Exhibit A

Mark / Reg. No	Goods	Summary of Evidence Sufficient for Finding of Acquired Distinctiveness
 RN: 3456721	Class 29 - frozen seafood, and prepackaged entrees consisting primarily of seafood	<ul style="list-style-type: none"> Nearly 28 years of continuous use. Over \$10 million in television advertising between 2004 and 2007, including a Super Bowl commercial. At least \$250 million in sales in previous 5 years. Evidence of use of color yellow in advertisements and point-of-purchase materials Website evidence of consumer statements associating yellow box with applicant. No survey evidence. <p><i>See</i> May 18, 2016 Response to Office Action, TSDR pgs. 4-17</p>
 RN: 4562635	Class 9 - computer software for teaching foreign languages; computer software for learning foreign languages	<ul style="list-style-type: none"> 8 years of continuous use. More than \$85 million in advertising between 2004 and 2008, and more than \$30 million annually in advertising between 2009 and 2012. At least \$1.3 billion in sales between 2004 and 2012. Website evidence of consumer statements associating yellow packaging with applicant, and referring to yellow box as “iconic,” “trademark,” and “signature.” Consumer depositions from prior litigation associating mark with applicant. Survey evidence of 42% of surveyed consumers associating packaging with a single source, and 34% associating packaging with applicant. <p><i>Id.</i> at TSDR pgs. 18 - 57</p>
 RN: 3110845	Class 30 – baked goods, namely brownies	<ul style="list-style-type: none"> Over 12 years of continuous use. Approximately \$5 million invested between 1992 and March 2005 towards “product marketing strategies” Approximately \$25 million in sales between 1992 and March 2005. Evidence of use of the color purple in advertisements and point-of-purchase materials. Evidence of unsolicited media references to purple coloring of packaging. No survey evidence. <p><i>Id.</i> at TSDR pgs. 58 - 68</p>

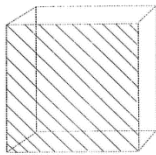
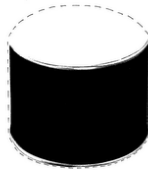

Mark / Reg. No	Goods	Summary of Evidence Sufficient for Finding of Acquired Distinctiveness
 (color green) RN: 2096542	Class 29 - frozen prepared dinners and entrees consisting primarily of beef, poultry, seafood and/or vegetables Class 30 - frozen prepared dinners and entrees consisting primarily of pasta; frozen french bread pizza and ice cream	<ul style="list-style-type: none"> • Evidence of numerous advertisements featuring green product packaging. • Survey evidence of 39% of surveyed customers associating packaging with applicant, and 51% association when subjects provided with list of major brands from which to choose. <p><i>Id.</i> at TSDR pgs. 69 - 81</p>
 RN: 3629229	Class 29 - Pasteurized, processed, canned crab meat	<ul style="list-style-type: none"> • 17 years of continuous use. • Claim of expected annual sales of \$500 million within the next three years. • Evidence of references to “black can” in advertising. • Website evidence of consumer statements associating black can with applicant. • No survey evidence. • No evidence of advertising expenditures. <p><i>Id.</i> at TSDR pgs. 82 - 96</p>
 RN: 4284957	Class 3 – cosmetics; non-medicated skin care preparations; non-medicated sun care preparations	<ul style="list-style-type: none"> • Over 44 years of continuous use. • Over \$2.8 billion in sales over previous 5 years. • Over \$67 million in advertising and promoting products featuring the color. • Evidence of advertisements presenting product packaging as “star” or “hero” of advertisement (though no claim of “look-for” advertising) • Website evidence of editorial articles associating green color with applicant. • No survey evidence. • Applicant notes that the present Examining Attorney accepted the claim of acquired distinctiveness for this registration. <p><i>Id.</i> at TSDR pgs. 97 - 130</p>

Exhibit B

Steven Espenshade

From: Hussain, Tasneem <Tasneem.Hussain@USPTO.GOV>
Sent: Tuesday, May 03, 2016 11:05 AM
To: Steven Espenshade
Subject: RE: Serial No 86757390

Good afternoon, Mr. Espenshade,
Please review the correspondences below which should answer the question you had in your voicemail of today regarding the DVD. If you have any additional questions regarding the Office Action, please email me and I hope to be able to assist you.

Sincerely,
/Tasneem Hussain/

From: Hussain, Tasneem
Sent: Wednesday, March 30, 2016 3:30 PM
To: 'Caldwell Camero'
Cc: Tiffany Larson
Subject: RE: Serial No 86757390

Good afternoon, Ms. Camero,
Thank you for your inquiry and well wishes – I hope your week is going well too.

I confirmed with the staff that the DVD could not be converted into a format that would be viewable or make it part of the record. The DVD you sent exceeds the Office's requirements and ability to convert and attach to the application. See Office Action and TMEP §904.03(d).

Please also note that any DVD or survey you send would not overcome the refusal or the denial of the Section 2(f) claim because (a) the mark is not inherently distinctively and (b) applicant does not have "substantially exclusive" use of the color on the box. The evidence of record confirms that many third parties offer cereal in yellow boxes. Applicant may, however, amend the application to the Supplemental Register.

I hope this helps.
Sincerely,
/Tasneem Hussain/

From: Caldwell Camero [<mailto:Caldwell.Camero@genmills.com>]
Sent: Wednesday, March 30, 2016 3:25 PM
To: Hussain, Tasneem
Cc: Tiffany Larson
Subject: Serial No 86757390

Dear Ms. Hussain,

I hope you're having a good week. You note in your Office Action in the above-referenced application that the DVD we submitted "cannot be found and/or cannot be converted into a format that would be viewable or make it part of the record." It looks like the DVD was received, but the content, particularly, the survey, has not been uploaded to the file. We ensured that the DVD was submitted in proper format. Can you tell me, please, did you receive the DVD?

Thank you for your help.

Caldwell Camero
Trademark Counsel
General Mills, Inc.